IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.1324 OF 2005

The State of Maharashtra .. Appellant
Versus
Pandurang Vishnu Anturkar .. Respondent

Mrs.G.P.Mulekar, AGP for appellant
Mr.A.V.Anturkar i/b Mrs. Vinita V.Bakare-Shastry for respondent

CORAM : P.V.KAKADE, J.

DATE : 25TH OCTOBER, 2005

P.C.:

1. This appeal is preferred against the judgment and order passed by the learned Addl. District Judge, Pune dated 26th July, 2005 dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior Division, Pune dated 30.4.2004 in R.C.Suit No.2079 of 1983.

2. I have heard the learned counsel for both the parties. Perused the record.

3. The Plaintiff is resident of Pune. The defendant is an authority established under Maharashtra Housing and Area Development (hereinafter called as

"MHADA"). According to the plaintiff, the defendant had published an advertisement on 31.12.1977 in daily newspaper inviting applications from different income group holders to purchase the flats to be constructed at Gokhale Nagar area Pune. Plaintiff submitted an application bearing No.107 under higher income group category, as he was eligible under the said group. After holding the draw of various applications, plaintiff was found eligible person to purchase the flat under high income group. At that time entitlement for higher income group was for Rs.1500/= per month. Plaintiff was serving in Herlekar Precision Engineering Company, Pune and his salary was Rs.1450/= + Rs.50 as allowance + yearly bonus in the year 1977-78. Therefore, he has submitted his salary certificate with the defendant. He had received bonus of Rs.1080/= from his company in the year 1977-78. After receiving the necessary instructions from the defendant and complying thereof the plaintiff had deposited an amount of Rs.2,500/= on two occasions in the month of January 1978 and July 1978. In the meantime plaintiff left the said service and joined service in P.M.T. Machine Tools Automobiles Pvt. Ltd. from 1.1.1978. He was drawing salary at the rate of Rs.1575/= p.m. and his income

from all the sources from the month of January 1978 was Rs.1,727/=.Therefore, plaintiff contended that he was entitled to get one tenement at Gokhale Nagar. However, defendant informed to the plaintiff by letter dated 7.7.1979 that the earlier allotment had been cancelled as his monthly salary was less than Rs.1500/=. It was contended that the defendant had no reason to cancel the earlier allotment and hence the plaintiff raised the grievance by preferring an appeal before the Government of Maharashtra under the provisions of MHADA. However, the appeal was dismissed on 28.4.1983. Thereafter legal notice was issued to the defendant on 5.7.1983 and suit was instituted for declaration and injunction in the lower court praying for declaration that the act of the defendant was bad in law and hence it was prayed that it should be set aside and perpetual injunction as sought for and other consequential reliefs. The defendant resisted the suit claim, inter alia, denying the allegations made by the plaintiff with submission that the suit was barred by law of limitation as contemplated under Section 173 of the MHADA Act and sought dismissal of the suit.

. The learned trial judge adjudicated the dispute

on merits and on the basis of available evidence came to the conclusion that the plaintiff had proved that he was entitled for the tenement from the defendant and that cancellation of earlier allotment was illegal. It was further held that the civil court had jurisdiction to try the suit and the suit was also within limitation and as such suit came to be decreed. The appeal was carried to the District Court. The learned District Judge after hearing both the parties came to the conclusion that the plaintiff was eligible candidate under high income group to get tenement from the defendant and cancellation of the allotment made by defendant was illegal. It was further held that the civil court had jurisdiction to entertain and try the suit and it was within limitation and hence the appeal dismissed. Hence the present appeal.

4. At the outset it may be noted that there is no substantial question of law involved in this appeal. The learned counsel for the appellant submitted that the suit was barred by law of limitation by virtue of provisions of Section 173 of the MHADA Act. It was also submitted that the suit was hit by Order 2 Rule 2(3) of the Civil Procedure Code. Thirdly it was submitted that

the plaintiff was not entitled for the allotment as he was not within the bracket of high income group for allotment of a tenement of such category and on that basis it was submitted that the appeal deserves to be admitted.

5. In this regard my attention was invited to provisions of section 173 which reads thus -

> "that two months previous notice in writing of the intended suit and of the cause thereof has to be issued, and should not be after six months from the date of the act complied of."

. It was submitted on behalf of the respondent that the application came to be dismissed and allotment came to be cancelled by order dated 7.7.1979 and notice was issued on 5.7.1983 and suit for declaration and injunction was filed within six months thereafter and therefore, the suit is not barred by provision of Section 173 of the Act. It was submitted on behalf of the appellant that the suit was barred by law of limitation, as it was not in compliance with the provision of Section 173 as the cause of action arose

when first cancellation of allotment by letter dated 7.7.1989 was made. In this regard it must be noted that after first cancellation, as the record shows, the plaintiff pursued the remedy of appeal against the said order under the statute to Government of Maharashtra, which came to be dismissed on 28.4.1983 and immediately thereafter notice came to be issued on 5.7.1983 followed by filing of the suit within six months. Therefore, it cannot be said that the suit is barred by limitation because the plaintiff had persuaded the remedy as contemplated under the law and therefore, it cannot be said that the cancellation of the allotment was finally confirmed by the letter dated 7.7.1979, but in fact it was on dismissal of the appeal to the State Government on 28.4.1983. Under these circumstances the so called question of limitation cannot be said to be substantial question of law.

6. So far as bar of Order 2 Rule 2 of Civil Procedure Code is concerned, it is to be mentioned that the said provision is not applicable to the present case. The provision of Order 2 Rule 2 would be invoked only if there is non inclusion of whole claim or relinquishment of part of claim or omission to sue for

one of several reliefs, which is not the case here and without further elaboration, I must note that this provision is not applicable at all in the present dispute.

7. The learned counsel for the appellant also submitted that there was bar of limitation to entertain the suit by the civil court. In this regard without further elaboration I must note that the learned lower appellate court has rightly held that the civil court's jurisdiction is not ousted by virtue of Section 177 of the Act. It is observed by the lower appellate court that the plaintiff has sought the relief of declaration and permanent injunction in respect of cancellation of his allotment of flat. According to import of section 177 of the Act, no civil court shall entertain any matter or any action which the authority or the Tribunal is empowered by or under the said act to determine and no injunction or stay shall be granted in respect of any action taken in pursuance of powers conferred by the said Act. However, in the present case the plaintiff has challenged the cancellation of allotment order and rejection of application though he was eligible to get the flat under high income group. There is no provision

under the said Act before whom cancellation of allotment order can be challenged. No forum is given under the said act to deal with such legal questions and then obviously, civil court gets jurisdiction to decide and determine the legality of the impugned order issued by the defendant whereby the allotment came to be cancelled. Moreover, Section 177 of the Act also showed that the aggrieved person can institute the suit against the defendant subject to certain conditions embodied thereunder. In my considered view, though it is true that the statute provides an appeal against the order of cancellation, still civil right of a party to redress the grievance cannot be taken away by statute and especially when factual aspects showed that interpretation of the term of income was wrongly made by the concerned authorities and therefore, in order to establish the civil right of the party the plaintiff had every right to seek redress from civil court. Under these circumstances I must hold that bar of Section 177 of the Act cannot come in the way of the plaintiff in this case.

8. So far as question of quantum of income is concerned, it is a mix question of law and facts and

therefore, this court in Second Appeal would not be justified in going into controversy in that regard. However, it is needless to mention that at the relevant time the plaintiff was serving in a private industrial Unit to which Payment of Bonus Act was applicable. In other words, the employer was under statutory obligation to pay industrial bonus to the employees and therefore, it must be held that the emoluments included bonus amount while calculating the income of the respondent. It was submitted on behalf of the appellant that there is no proof brought on record on behalf of the respondent to show that he was actually paid bonus during the relevant time. However, it must be noted that when there is a statutory obligation on the part of the employer to pay bonus to its employees there is no question of demanding any proof of actual payment thereof and under such circumstances it must be held that income of the respondent was required to be included along with bonus amount which was payable to him.

9. In other words, both the courts below have concurrently found that the plaintiff-respondent is entitled to decree in the suit. It is also seen from

the record that the available evidence is seen to be properly appreciated by the courts below and no interference is called for by this Court at all in this appeal. In view of this position, I see no merits in the appeal and the appeal stands dismissed with no order as to costs.

. Consequently Civil Application also stands dismissed with no order as to costs.